Filed 10/27/09 In re A.R. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.R., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.A., Defendant and Appellant.	E048289 (Super.Ct.No. J222112) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Affirmed.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant.

Ruth E. Stringer, County Counsel, and Jeffrey L. Bryson, Deputy County Counsel, for Plaintiff and Respondent.

Linda Rehm, under appointment by the Court of Appeal, for Minor.

In this appeal, R.A. (Father) argues that the juvenile court abused its discretion in denying his Welfare and Institutions Code section 388[1] petition. We reject this contention and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

The child who is the subject of this dependency proceeding was born in 2008 at Arrowhead Regional Medical Center in Colton. She came to the attention of the Department of Children's Services[3] (the department) when hospital staff reported that the mother (Mother) tested positive for methamphetamine at the time of delivery, although the child tested negative. Further investigation revealed that Mother had a long history of substance abuse and had failed to reunify with two other children. Mother reported that the child's father's first name was Robert, but she did not know his last name or his whereabouts. He was not named on the birth certificate.

Father was located in custody in county jail and did appear at the detention hearing on June 16, 2008. His mother and grandmother also appeared, and Father's attorney asked that they be assessed for placement. The juvenile court found a prima facie case

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[1] All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

[2] The factual background up until the termination of reunification services is taken from Father's prior appeal in case No. E047330.

[3] The department is now known as San Bernardino County Children and Family Services.

for detention, and the child was placed with her maternal great-grandmother. The matter was continued to July 18, 2008, for a jurisdictional/dispositional hearing.

The report prepared for the jurisdictional/dispositional hearing recommended that no reunification services be provided to either parent. This recommendation was based on Father's status as an alleged father as well as his failure to contact the department after being released from custody despite knowledge of the proceedings.

Father was not present at the July 18, 2008, hearing although his grandmother and two aunts were. A contested jurisdictional hearing was scheduled for August 18 to be followed by a contested dispositional hearing on August 25.

Father was not present at the August 18, 2008, hearing. His attorney explained that she thought Father had been released from local custody but had discovered he was incarcerated at Tehachapi State Prison. Because of this confusion, she needed to prepare an order to transport Father. The court granted a continuance of the pretrial settlement conference and jurisdictional hearing to September 24 and the dispositional hearing to September 25.

Also on August 18, 2008, Father's attorney requested a paternity test and, assuming paternity was established, requested the paternal grandmother be considered for placement.

Father requested a continuance in September because the results of the paternity test were not available. Over the objections of the department and the child's attorney, the court continued the matter to October 20, 2008.

The case was again continued from October 20 to November 20, 2008, this time because the social worker was unavailable and the paternity test was still pending. The department confirmed that the child had been moved from the maternal great-grandmother's home and placed with her half sibling in a concurrent placement home. Although the paternal grandmother and paternal great-grandmother had been visiting the child every weekend up until the move, the court determined that further visits would not be authorized until paternity was confirmed.

The November 20, 2008, hearing was also continued due to court congestion and further delay in obtaining the paternity test results because of the prison facility's failure or refusal to release them. Because Father was scheduled to be released the following week, the department recommended that he make arrangements for testing upon his release.

The contested jurisdictional/dispositional hearing was held on December 15, 2008. The results of the paternity test were received shortly before this hearing and confirmed that Father was the child's biological father. The department believed, however, that it would not be in the child's best interests to offer services to the father. The social worker noted that Father had not participated at all in the child's life for the previous five months because of Father's incarceration. In addition, he had not lived with or supported Mother during her pregnancy. He had never been married to Mother and was not listed on the child's birth certificate. Father informed the social worker that when he and Mother separated, he knew she was two months pregnant and that the child was his. However, he

did not believe he needed to look for her or support her. He did say that he attempted to telephone her one time. When the social worker questioned him further, Father stated that it was not his job to track her down, and he did not want to be seen as a stalker. He added that Mother's girlfriend did not want him in the picture.

The social worker opined that it was unlikely Father could reunify within the legal time frames even if offered services, noting he was currently incarcerated, had never been steadily employed, and had never supported himself. Although he was present at the detention hearing, Father did not request a paternity test or ask for services even after meeting with the social worker. Thereafter, he never contacted the department by phone or mail to request information about his child. The social worker suspected that Father's interest in reunification was due to pressure placed on him by the paternal great-grandmother, who was interested in having the child placed with her. Father told the social worker he believed that the child would be moved immediately to his grandmother's home if it were shown he was the biological father. The social worker explained that, even if the court ordered services, there would not be a change in the child's placement because she was in a concurrent planning home with a sibling. To this, Father responded, "[Y]ou mean that I have been wasting my time[?]"

The juvenile court made findings that jurisdiction existed under section 300, subdivisions (b) and (j). With regard to disposition, the court found clear and convincing evidence that the child should be removed from the custody of the parents. It further

found that Father was the biological father, but it would not be in the child's best interests to offer Father reunification services.

Father subsequently filed a writ petition, challenging the denial of services and failure of the department to assess relative placements, which was denied. (*R.A. v. Superior Court* (Mar. 5, 2009, E047330) [nonpub. opn.)

On March 23, 2009, the department filed a section 366.26 report recommending termination of parental rights. The then-10-month-old child appeared to have no relationship with her biological parents, even though she had recently begun visiting Father. The child was bonded and emotionally attached to her adoptive parents and her sister.

On April 16, 2009, Father filed a section 388 petition, seeking to declare him a presumed father and order reunification services. In support, Father had attached a certificate of completion of a parenting program and a memorandum from his therapist noting he was doing well. According to a declaration filed by his attorney, he was scheduled to complete a substance abuse program by May 2009. Father also claimed that he was drug testing once a month with negative results; he had been visiting the child, and the visits had gone well; he loved his daughter and had a family support system in place; he was in the process of obtaining a job; and his permanent home was with the paternal great-grandmother. Father further asserted that he had benefitted from the classes he had taken and that he was "ready and willing to parent his child on a full[-]time basis" and could "provide a loving and stable home" for her.

The social worker filed a written response in opposition to the section 388 petition noting that the child was doing well in her adoptive home and was "extremely attached to her foster parents and half sibling." The social worker further pointed out that in the 10 months since the child was born, Father had visited with her three times and that it was not in the child's best interest to uproot her from the loving, stable home she had known for most of her young life. While commending Father's efforts, the social worker opined that even though Father's circumstances were changing, they were not changed to a point sufficient to delay permanency for the child.

The hearing on the section 388 petition was held concurrently with the section 366.26 hearing on April 29, 2009. At that hearing, Father did not testify and offered no other evidence beyond the petition. Following argument, the court denied the section 388 petition, noting it was not in the child's best interest and that, "[a]lthough Father has made progress, the circumstances are changing, but they have not changed." The court subsequently found the child to be adoptable and terminated parental rights.

II

DISCUSSION

Father alleges several errors pertaining to the denial of his section 388 motion. First, he claims that he had a constitutional due process right to try to establish presumed-father status and to develop a relationship with the child, which was hindered by the court's visitation order. Second, he asserts that the court abused its discretion in denying his section 388 petition as it was in the child's best interest to grant Father presumed-

father status and reunification services. In support, Father primarily relies on *In re Julia U.* (1998) 64 Cal.App.4th 532 (*Julia U.*).

Initially, we find Father forfeited his first claim of error by not raising it in juvenile court. "A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221.) A "reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] . . . [¶] Dependency matters are not exempt from this rule." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. omitted.) Forfeiture applies to claims of statutory error and to claims of violations of fundamental constitutional rights. (*In re Seaton* (2004) 34 Cal.4th 193, 198.)

Father did not argue in the juvenile court that the visitation order hindered his ability to establish presumed-father status or that he had a due process right to try to establish presumed-father status. Father also failed to raise this contention in his earlier writ petition. In that proceeding, Father did not argue that he was erroneously denied presumed-father status but that he should be granted the same rights as a presumed father as a matter of equity. Because, although he was represented by counsel, Father did not argue the issue in the juvenile court or in this court in his earlier writ petition, we conclude he has forfeited it on this appeal.

Moreover, Father has not shown he was denied due process. "[D]ue process requires 'notice reasonably calculated, under all the circumstances, to apprise interested

parties of the pendency of the action and afford them an opportunity to present their objections.' [Citation.]" (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418.) "The essence of due process is fairness in the procedure employed . . . ." (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 757.) Father had reasonable notice and the opportunity to be heard. He has not shown unfairness.

In any event, Father's contentions are unmeritorious.

Section 388 allows a parent to petition the juvenile court to modify a previous order "upon grounds of change of circumstance or new evidence . . . ." (§ 388, subd. (a).) The moving party bears the burden of proof to show, "by a preponderance of the evidence, changed circumstance or new evidence and that the modification would promote the best interests of the child." (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446.) Whether an order regarding reunification services should be modified "rests within the sound discretion of the juvenile court, and its decision will not be disturbed on appeal absent a clear abuse of discretion." (*Id*. at p. 447; see also *In re Kimberly F*. (1997) 56 Cal.App.4th 519, 522 ["[i]t is rare that the denial of a section 388 motion merits reversal as an abuse of discretion"].)

Applying this standard of review to the facts of the instant case, we conclude the juvenile court did not abuse its discretion in determining that the new evidence shown by Father in his section 388 petition did not warrant his receipt of reunification services. Under section 361.5, subdivision (a), services are to be provided to a biological father only "if the court determines that the services will benefit the child." Here, the juvenile

court relied on legally proper considerations, adequately supported by evidence in the record, in determining that the provision of services to Father would not "benefit the child."[4] (*Ibid*.) The juvenile court concluded that, although Father had made progress, his circumstances were changing, not changed, and the child's best interest, i.e., her need for stability, was met in the home where she had been residing and bonding with her foster parents and half sister.

The evidence Father presented to counteract the child's need for stability paled in comparison. In essence, in support of his petition, Father merely presented evidence that he had been taking steps to change his life for the better, i.e., completing a parenting program, attending therapy and substance abuse classes, and drug testing with negative results. There was no evidence presented to the juvenile court to rebut the powerful evidence that providing Father with reunification services would not be in the child's best interest, considering it took him about six months to show any commitment to the child even though he knew of the child's birth at the time of the detention hearing. (See *R.A. v. Superior Court*, *supra*, case No. E047330.) Father failed to bring forth any evidence that provision of services to him was in the child's best interests -- a failure that was particularly significant given the overwhelming evidence that it was not.

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[4] At the time the juvenile court initially declined to offer services to Father, he was a "biological father," and the juvenile court had discretion to grant services "if the court determines that the services will benefit the child." (§ 361.5, subd. (a).)

Given this record, we cannot conclude that the juvenile court abused its discretion in concluding that, despite the evidence presented in support of Father's section 388 petition, the provision of services to him was not in the child's best interests. (*In re Aaliyah R., supra,* 136 Cal.App.4th at p. 447.) Rather, the court acted within its discretion in concluding that the provision of such services would be an unproductive exercise, serving only to delay the child's permanency and stability.

Father argues his case is similar to that of *Julia U., supra,* 64 Cal.App.4th 532, where a biological father had contacted the social worker to inquire about the child as soon as he learned he might be her father, but the juvenile court refused to appoint counsel until testing confirmed parentage, and it terminated services before the determination was made. (*Id*. at pp. 535-539.) The appellate court reversed the order terminating parental rights and reunification services. It opined the social services agency had unreasonably delayed in locating the father and did not act quickly to establish paternity, and the court had focused only on the child's best interests, overlooking the father's interests. (*Id.* at pp. 542-544.) In essence, the Second District reversed the judgment in *Julia U.* because the juvenile court failed to allow the biological father to participate in the process whereby his parental rights were terminated and never considered his viability as an alternate placement option.

Father's situation is different. The court appointed counsel at his first appearance in court, the detention hearing, and, although there was delay in paternity testing, there was no showing the department caused the delay. Moreover, even though Father knew

he was the child's father early in Mother's pregnancy, at the detention hearing, he did not request a paternity test or ask for services even after meeting with the social worker. Father here fully participated with appointed counsel in the proceedings regarding the custody and care of the child and was allowed to do so even before his paternity was established. Also, Father had always understood he was the child's father, yet he made no effort to establish a relationship with her. *Julia U.* does not support Father's arguments.

We also reject the suggestion that Father's constitutional rights were somehow violated by the delay in his receipt of paternity test results. First, no such argument was made to the trial court, or in his prior writ petition, and consequently the contention is forfeited. (*In re S.B.*, *supra*, 32 Cal.4th 1287, 1293.) Second, the case Father cites for the proposition that the delay in the paternity testing violated his constitutional right is *Julia U.*, *supra*, 64 Cal.App.4th 532, 544, which we have already distinguished. Given the absence of legal support for Father's asserted constitutional right to prompt paternity test results, we decline to recognize such a right here. As it is well established that a biological father "does not have a *right* to reunification services merely based on his status as the biological father," we do not see how, on the facts of this case, the delay in paternity testing that purportedly impinged on Father's ability as a biological father to

request such services could constitute the violation of a constitutional right. (*In re Sarah C.* (1992) 8 Cal.App.4th 964, 976.)[5]

In addition, substantial evidence would have supported denying services to Father even had his paternity been established in a more timely manner. Section 361.5, subdivision (a) provides that upon a declaration of paternity a juvenile court may order services for the biological father if the court determines the services will benefit the child. Father made no showing that offering reunification services to him would be of any benefit to the child. They did not have a parent-child relationship. Even though Father knew he was the father of the child, he failed to show any type of commitment to her until she was several months old. It also appears that Father was not interested in the baby, but rather his interest in reunification was due to pressure placed on him by the paternal great-grandmother, who was interested in having the child placed with her.

We also reject Father's claim that the visitation order prevented him from establishing his status as a presumed father. The law distinguishes between biological

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[5] In fact, there is no suggestion in the record in this case that the delay in receiving the results of the paternity test prejudiced Father's ability to assert his interest in parenting the child. Even before the paternity test results came back, there was little dispute that Father was the biological father. At the time the child was detained, Mother had reported that the child's father's first name was Robert, and Father knew he was the father early in Mother's pregnancy. Father was also present at the detention hearing. Consistent with this fact, the juvenile court allowed Father to participate through counsel in the proceedings and had granted visitation to Father. Yet Father failed to be actively involved in the child's life until after she was placed in her adoptive home, despite his knowledge of the proceedings and that the child was his. Thus, the record strongly suggests that the delay in the paternity test results had no impact on Father's ability to visit the child or to take steps to demonstrate to the court that he could adequately care for her.

and presumed fathers. A biological, or natural, father is one who has established paternity but who has not achieved statutory presumed-father status. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.) Only a presumed father is entitled to receive reunification services and to assume custody of a child. (*Id*. at pp. 451, 454.) To be a presumed father, a man must qualify under one of several categories set out in Family Code section 7611. At issue here is subdivision (d), which provides a man is presumed to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child." The first requirement, receiving the child in the home, has been held unconstitutional to the extent that it allows a mother or third person to prevent a father from becoming a presumed father by preventing him from physically bringing the child into his home. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 812.)

The test for the "holding out" requirement is that, "[o]nce the father knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit.' In particular, 'the father must demonstrate "a willingness himself to assume full custody of the child -- not merely to block adoption by others." . . . ' The trial court should also consider 'the father's public acknowledgment of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child.'" (*In re Jerry P.*, *supra*, 95 Cal.App.4th at p. 806.)

Here, Father failed to make out a prima facie case for presumed-father status, so Father was properly treated as a biological father, as this court previously found. Father

knew early on in Mother's pregnancy that he was the child's father, yet took no actions to demonstrate a full commitment to the child, except attend the hearings with his relatives. Father essentially waited several months after the child was born before showing any devotion to her. Once presumed-father status was denied, Father had no right to visitation. Visitation is an incident of reunification services (§ 362.1, subd. (a)(1)(A)), and only a presumed father is entitled to reunification services (*In re Zacharia D., supra*, 6 Cal.4th at p. 451.) So without presumed-father status, Father was not entitled to visitation as a matter of right, even though he was receiving visitation. Father has failed to show a prima facie case for presumed fatherhood or that reunification services were in the child's best interest.

In sum, we conclude that Father has failed to carry his burden of establishing that the juvenile court abused its discretion in denying his section 388 petition. The record adequately supports the juvenile court's conclusion that, even in light of the new evidence or changed circumstances established in the petition, the provision of services to Father would result in little benefit to the child and substantial detriment in that it would interrupt the stability and delay the permanency of the child's ultimate placement. (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293 ["[b]ecause [dependency] proceedings involve the well-being of children, considerations such as permanency and stability are of paramount importance"]; *In re Sarah C.*, *supra*, 8 Cal.App.4th at pp. 977-978 [denial of section 388 petition seeking reunification services not abuse of discretion in light of the father's "status as a mere biological father," his limited relationship with his daughter, "only

vague plans of how he would care for [her]" and the minor's interest in stability in existing placement].)

III

DISPOSITION

The judgment is affirmed.

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RICHLI
Acting P.J.

We concur:

GAUT
J.

KING
J.